United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

979

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 23,955

UNITED STATES OF AMERICA

v.

HERMAN E. BROWN, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cr. No. 476-69

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I N D E X

TABLE OF CASES

TABLE OF CASES (Con't)

OTHER REFERENCES

*Cases or authorities chiefly relied upon are marked by asterisks.

ISSUES PRESENTED*

1. Whether under D. C. Code (1967) Title 22, Section 3204 (Carrying Concealed Weapons) it is a crime for a person to possess a firearm in his own home.

2. Whether the Court below erred in denying Appellant's motion for judgment of acquittal as to the charge of carrying a dangerous weapon.

3. Whether the Government failed to prove all the elements of the offense of assault on a member of the police force with a dangerous weapon.

*This case has not previously been before this Court, Rule 8(d).

REFERENCE TO RULINGS

The trial Court did not make any findings of fact, conclusions of law or opinions.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,955

UNITED STATES OF AMERICA

v.

HERMAN E. BROWN, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. 1291. A three count indictment was filed in the United States District Court for the District of Columbia on April 2, 1969, charging the appellant, Herman E. Brown with violations of 22 D. C. Code 502, 505(b) and 3204, respectively. (Assault with Dangerous Weapon, Assault on Member of Police Force with Dangerous Weapon; Carrying Dangerous Weapon). Appellant pleaded not guilty and was tried

by jury. At the trial the Government moved orally to dismiss Count 1 of the indictment charging Appellant with assaulting Jerdine M. Brown with a dangerous weapon, which motion was heard and granted. Count 1 of the indictment was thereafter deleted and the remaining Counts 2 and 3 were re-numbered Counts 1 and 2 respectively, being Assault on Member of Police Force with a Dangerous Weapon and Carrying a Dangerous Weapon. Appellant was found guilty of both counts by the jury. On November 12, 1969, Appellant filed a Motion for a New Trial which was denied on December 5, 1969. On December 1, 1969, the Government filed an "Information As To Previous Conviction", pursuant to 22 D. C. Code 3204, and on January 19, 1970, the Court sentenced Appellant to imprisonment for a period of 18 months to 54 months on Count 1 of the re-numbered copy of the indictment and 1 year to 3 years on Count 2 thereof, said sentences by the counts to run concurrently. Appellant promptly thereafter filed a notice of appeal and was granted leave to proceed in forma pauperis.

STATEMENT OF THE CASE

There are two transcripts involved in this appeal. For the convenience of the Court, the transcript of the trial proceedings held on November 6, 1969, shall hereinafter be referred to as ("Tr.)", and the transcript of the preliminary hearing held on February 7, 1969, in the District of Columbia Court of General Sessions, Criminal Division, shall hereinafter be referred to as ("PH Tr.)".

The Appellant was charged in a 3 count indictment as follows: 1. That on or about February 3, 1969, he assaulted one Jerdine M. Brown with a dangerous weapon, that is a pistol; 2. That he assaulted one John A. Schmitt with a dangerous weapon, that is, a pistol, knowning him to be a member of the

Metropolitan Police Department, engaged in the performance of his official duties; and 3. Carrying a dangerous weapon, that is, a pistol, without a license. At the trial, before the taking of any testimony and out of the presence of the jury, the Government moved to dismiss Count 1 of the indictment pertaining to the alleged assult upon Jerdine M. Brown, appellant's wife. The Court thereupon dismissed Count 1. (Tr. 4, 5, 18, 19).

The Government called as its first witness Officer John A. Schmitt, who testied that he was a member of the Metropolitan Police Department, and on February 3, 1969, was on duty assigned to the Tenth Precint. That around 5:30 in the afternoon that day he and his partner, Officer Sterling C. Robinson, both in policemen's uniform, received a radio run for a fight, possibly a gun involved, at 1014 Columbia Road, N. W. (Tr. 20, 21). That they responded to the scene, parked their car and observed two Negro females and a Negro male identified as Appellant, and before alighting from the scout car, the Appellant came over to them and informed them that there had been a man in their apartment on the third floor, armed with a gun. (Tr. 21, 22). Thereupon, Appellant led Officer Robinson and himself into the doorway, up the stairs and into the apartment where they searched for five to seven minutes, and as they were getting ready to leave, Mrs. Brown came to the door and asked him, "Did you get the gun?". (Tr. 22, 23). That he said no, that there wans't anybody in the apartment except the three of them and no gun had been found, whereupon Mrs. Brown stated "My husband has the gun." (Tr. 22, 23, 24). Officer Schmitt further testified that at about the same time he saw Appellant looking toward the living room and followed him a few paces, whereupon Appellant reached into his right front pocket and drew a small gun and

pointed it at him. That he had a struggle with Appellant and recovered the gun. (Tr. 24). (It is to be noted that at the Preliminary Hearing held on February 7, 1969, in the Court of General Sessions, Officer Schmitt in his testimony at that time stated that Appellant took the gun from his left front pocket.) (PH Tr. 5). A .22 two-shot Derringer pistol which Officer Schmitt testified was recovered from Appellant in his apartment at 1014 Columbia Road, N. W., was marked as Government's Exhibit No. 1. (Tr. 24, 25).

On cross examination this witness testified that he did not at any time see the gun until Appellant pulled it from his right front pocket while in the living room, when he jumped Appellant and disarmed him. (Tr. 30, 33). That when Appellant pulled the gun, he made no statements, never said a word, no shots were fired and that he surmised that Appellant was going to use the weapon which caused him to take the gun away from Appellant. (Tr. 33, 34, 35, 36). At the Preliminary Hearing this witness also testified that at the time Appellant had the gun in his apartment there was no exchange of words between Appellant and himself. (PH Tr 5). Officer Schmitt further testified on cross examination that on February 3, 1969, he knew that it was not unlawful for a citizen to have a firearm in his own home. (Tr. 34).

The Government then called as its next witness Officer Sterling C. Robinson, who testified that on February 3, 1969, he was assigned to to the Tenth Precint, and that on that day he was riding in a scout car with Officer Schmitt. That he was in uniform and at about 5:30 p.m. they received a run for a fight, possibly a gun involved, and responded to 1014 Columbia Road, N. W. (Tr. 36, 37). Upon arriving on the scene there were three people, two females and one male, the Appellant. That Appellant came up and stated that there was a man in his apartment with a gun. (Tr. 38). That Appellant, Officer

Schmitt and himself proceeded upstairs into the apartment, searched and found no one, and as they were leaving Mrs. Brown came to the door and asked if we got the gun; and stated that her husband had a gun in his possession. (Tr. 38). This witness further testified that at this time the Appellant started back into the living room, followed by Officer Schmitt and himself, and that he saw Officer Schmitt leap forward in the direction Appellant had taken. He then saw Officer Schmitt and Appellant struggling for a small-handled gun that was held in the hand of Appellant, and when the gun fell out of Appellant's hand he picked it up and checked to see if it was loaded, which it was. (Tr. 39) Officer Robinson identified Government's Exhibit No. 1, as the .22 caliber Derringer that he retrieved from the floor of the apartment laying by the Appellant's hand. (Tr. 39). That he found one live round of ammunition and one expended round in the chamber of the pistol, and three live rounds in Appellant's pocket. Government's Exhibit No. 2, an envelope containing four live rounds of ammunition and one expended round was marked for identification. (Tr. 39, 40). Officer Robinson further testified that he test fired the gun and that it was an operable weapon. (Tr. 41).

On cross examination this witness testified that he had not seen the weapon prior to seeing it for the first time inside Appellant's apartment and did not hear any threatening statement being made by Appellant before he saw the gun. (Tr. 44).

At the conclusion of Officer Robinson's testimony Government's Exhibit No. 3. a license report was marked for identification and read to the jury. The report from the Metropolitan Police Department, Director of Central Records, certified that the Appellant, Herman E. Broan did not have on February 3, 1969, a license to carry a pistol in the District of Columbit, etc.

which Exhibit was received into evidence. (Tr. 48, 49). Appellant objected to the admission of Government's Exhibits 1 and 2 into evidence which objection was overruled by the Court. (Tr. 50). At the conclusion of the Government's case, Appellant moved for a judgment of acquittal, which motion was denied by the Court(Tr. 51).

Thereupon, the Appellant, Herman E. Brown was called as a witness in his own behalf, and testified as follows: That on February 3, 1969, he resided at 1014 Columbia Road, N. W., Apt. 303, along with his wife, Jerdine Brown, and that said apartment was in his name. That he was employed with the Washington Urban League as a community specialist and worked with the police. (Tr. 55, 56). That on February 3, 1969, when Officers Schmitt and Robinson came to his home, he was within his apartment and did not know why they came there. That the first time he saw them they were in his apartment and had entered by stealthy seizure. (Tr. 57, 58). That the first time he saw or had knowledge of the officers was when he was apprehended by seizure of his arms behind him, and while being pinned to the floor he looked and saw an officer with his gun drawn who made a remark that he should kill him. That his apartment door was open and he did not know how the officers came up to his apartment. (Tr. 58). Appellant further testified that he did not see Officer Schmitt outside the building, nor did he tell him that a man was up in his apartment. That he never had the gun in his possession and the first time he had ever seen Government's Exhibit No. 1, was when Officer Schmitt struck him in the face with it. (Tr. 60, 61). At the conclusion of Appellant's testimony, the Appellant rested his case and renewed his motion for judgment of acquittal which was denied. (Tr. 63, 64).

Following the trial proceedings, including the taking of all testimony, the argument of counsel and instructions of the Court, the case was submitted to the jury, and on November 6, 1969, the jury returned verdicts of guilty of Assault Upon a Member of the Police Force with a Dangerous Weapon and Carrying a Dangerous Weapon. Appellant's Motion for a New Trial and/or Judgment of Acquittal Non Obstante Verdicto was denied on December 5, 1969. On January 19, 1970, the Court imposed sentences of 18 months to 54 months and 1 year to 3 years respectively, said sentences to run concurrently, and from said sentences this appeal was taken.

STATUTES INVOLVED

D. C. CODE (1967) TITLE 22, Sec. 505(b).

ASSAULT ON MEMBER OF POLICE FORCE:

(a) Whoever without justifiable and excusable cause assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia, or any officer or employee of any penal or correctional institution of the District of Columbia, or any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia, whether such institution or facility is located within the District of Columbia or elsewhere, while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000, or imprisoned not more than five years or both.

(b) Whoever in the commission of any such acts uses a deadly or dangerous weapon shall be imprisoned not more than ten years.

D. C. CODE (1967) TITLE 22, Sec. 3204.

CARRYING CONCEALED WEAPONS:

No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

ARGUMENT

1. Under D. C. Code (1967) Title 22, Section 3204 (Carrying Concealed Weapons) it is not a crime for a person to possess a firearm in his own home.

Appellant herein was convicted of carrying a dangerous weapon, to wit, a pistol, which charge was brought under 22 D. C. Code, 3204. This section of the D. C. Code makes it a crime for a person to carry either openly or concealed a pistol, without a license having been issued therefor, except in his dwelling house or place of business or on other land possessed by him. The testimony of both government witnesses, Officers Schmitt and Robinson throughout the entire trial clearly and unequivocally established that the detection and seizure of the pistol was made within the living room of Appellant's apartment which was on the third floor of the apartment building where he lived. (Tr. 24, 26, 30, 33, 35, 38, 39, 40, 42, 46). There was no testimony whatsoever that the weapon was ever seen, detected or seized other than in the living room of Appellant's apartment at 1014 Columbia Road, N. W., Apt. 303, of which appellant was the lawful tenant and which was rented in his name. (Tr. 33. 56). There is no question that the first time the weapon was seen by both government witnesses, Officers Schmitt and Robinson was within Appellant's home, which is one of the exceptions set forth by 22 D. C. Code 3204.

In the case of Martan v. United States (1952) 87 U.S. App. D.C. 135, 183 F. 2d. 844, U. S. Court of Appeals for the District of Columbia, this Court held: "The D. C. Code, Sec. 22-3204 clearly establishes that possession of a firearm in one's home is not a crime". In the instant case

the pistol was never seen, detected or seized outside of Appellant's home, was within the exception of 22 D. C. Code 3204, and under the mandate of Kartan v. United States, supra, the possession of such by Appellant under the circumstances of this case was not a crime.

The Government's theory of circumstantial evidence as enunciated by the Prosecutor is untenable. (Tr. 50, 66), the theory being that since Appellant had talked with the police officers outside his home before the three of them went inside Appellant's home, it could be inferred that Appellant had the pistol outside of his home. (Tr. 50, 66). As has been stated above, the only testimony or evidence of ever seeing, detecting or seizing of any weapon occurred within Appellant's home. There can be no argument that the standard upon which a criminal conviction must be based is the celebrated requirement of proof of guilt "beyond a reasonable doubt". There is no question that in many cases, such findings of guilt are not based upon direct proof in every instance and that the standard may be met by circumstancial proof. Such proff, however, must not permit any conclusion based on mere possibility, speculation or conjecture, and must not leave unanswered any reasonable hypothesis of innocence. In the case of Carter v. United States, 102 App. D.C. 227, 232; 252 F. 2d. 508, 613 (1957) U. S. Court of Appeals for the District of Columbia Circuit, this Court held: "Unless there is substantial evidence of facts which exclude every reasonable phpothesis but that of guilty, verdict must be not guilty, and where all the substantial evidence is consistent with any reasonable hypothesis of innocence, the verdict must be not guilty". 1/

1/ See also Williams v. United States, 78 App. D.C. 322, 323; 140 F. 2d. 351, 352 (1944); Curley v. United States, 81 App. D.C. 389; 160 F. 2d. 229 (1947); Issac v. United States, 109 App. D.C. 34, 284 F. 2d. 168 (1960)

To sustain the conviction of carrying a dangerous weapon, this Court would have to find at least, that the evidence is more consistent with guilt than with innocence. (Williams v. United States, 1944, 78 U.S. App. D.C. 322, 323; 140 F. 2d. 351, 352. In the instant case there was no evidence that the pistol was carried by Appellant other than in his home. Where the evidence falls short of proof "beyond a reasonable doubt", the Courts of this jurisdiction consistently have reversed the trial Court's failure to acquit the defendant of the charged offense. 1/

2. The Court below erred in denying Appellant's motion for judgment of acquittal as to the charge of carrying a dangerous weapon.

At the completion of the Government's case, Appellant moved the Court for a judgment of acquittal as to the charge of carrying a dangerous weapon, which motion was denied. (Tr. 49, 50, 51). After Appellant rested his case, his motion for a judgment of acquittal was renewed which was again denied by the Court. (Tr. 62, 64). After the verdict of guilty was returned by the jury, Appellant once again renewed his motion by way of a Motion for a New Trial and/or Judgment of Acquittal Non Obstante Verdicto, which was also denied by the Court below. Appellant contends that his motion for a judgment of acquittal as to the charge of carrying a dangerous weapon should

1/ See, e.g. Callis v. United States, 101 App. D.C. 160; F. 2d. 566 (1957) Scott v. United States, 98 App. D.C. 105; 232 F. 2d. 362 (1956); Freidun v. United States, 96 App. D.C. 133; 223 F. 2d. 598 (1955); Hammond v. United States, 75 App. D.C. 395; 127 F. 2d. 752 (1942); Jackson v. District of Columbia, 180 A. 2d. 885, 887-88 (D.C. Mun. App. 1962); Baker v. District of Columbia, 184 A. 2d. 198 (D.C. Mun. App. 1962); Peterson v. District of Columbia, 171 A. 2d. 95 (D.C. Mun. App. 1961); Williams v. United States, 94 A. 2d. 473 (D.C. Mun. App. 1953).

have been granted, as there was absolutely no evidence that the gun was carried by Appellant other than in his own home which was not a crime.

> Rule 29, FEDERAL RULES OF CRIMINAL PROCEDURE, Motion For Judgment Of Acquittal, provides:
>
> (a) Motion before submission to jury.
>
> "Motions for directed verdict are abolished and motions of acquittal shall be used in their place. The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

Rule 29(a) of the Federal Rules of Criminal Procedure provides provides that a motion for judgment of acquittal must be granted after evidence on either side is closed if the evidence is insufficient to sustain a conviction. Under Rules 29(a), F.R.C.P. a judgment of acquittal is mandatory if the Government's case is insufficient. The trial judge has no discretion to reserve his ruling in the expectation that the defendant will testify. (Cephus v. United States, 117 App. D.C. 15; 324 F. 2d. 893, 1963). 1/

In the instant case the Court should have granted Appellant's motion for judgment of acquittal because the Government's evidence was insufficient to sustain a conviction. Although the trial Court refused

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1/ See e.g. Curley v. United States, 81 App. D.C. 389; 160 F. 2d. 229 (1947) Issac v. United States, 109 App. D.C. 54; 284 F. 2d. 168 (1960); Carter v. United States, 102 App. D.C. 227, 232; 252 F. 2d. 608, 613 (1957)

to grant Appellant's motion for judgment of acquittal on the charge of carrying a dangerous weapon, it can be reasonably inferred from the following quoted conversation that took place betterm Appellant's counsel, the prosecutor and the trial Judge at a bench conference at the close of the Government's case, as reported on Pages 49 and 50 of the Trial Transcript, that the Court felt that the evidence was insufficient to sustain a conviction:

> "Mr. Kemp: Your Honor, I would like to object to Exhibits 1 and 2.
>
> May I approach the bench, please?
>
> The Court: Yes.
>
> Mr. Kemp: I object to Exhibits 1 and 2 because it is my conclusion that this man did not carry these weapons in violation of the District of Columbia Code. He was on private property, he was in his home. He wasn't on public property when he was apprehended.
>
> Mr. Green: May I be heard, Your Honor?
>
> The Court: Go ahead.
>
> Mr. Green: Two points: With respect to the second count, the assault on the police officer, the right to bear arms in his home doesn't give him the right to assault a police officer. That is the first point.
>
> Secondly, the Government has presented evidence from which the jury may reasonably infer that this man had the pistol in his possession when the police first pulled up, thereby making it illegal.
>
> The Court: Outside the building, even though the finding of the gun was inside?" (Tr. 49, 50)

From the above quoted statement of the trial Court it certainly would appear that the Court did not feel that the evidence on the charge of carrying a dangerous weapon was sufficient to sustain a conviction. Appellant contents that the Court should have granted his motion and urges this Court to adopt his position.

3. The Government failed to prove all the elements of the offense of assault on a member of the police force with a dangerous weapon.

Assault has been defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another". Assault with a deadly weapon is nothing more than an assault where there is used either a deadly weapon or any means of force likely to produce great bodily injury. In the instant case, Appellant was charged with assault on a member of the police force with a dangerous weapon, the weapon being a pistol. The testimony clearly established that no shots were fired from the weapon nor were any threats made by Appellant. (Tr. 34, 35, 46, 47). The record is also completely viod of any testimony that the police officer sustained any type of physical injury. The testimony of Officer Schmitt was to the effect that Appellant pulled out the pistol and he thereupon jumped on Appellant and took it away from him. (Tr. 34, 35). It was never established by any testimony offered by the Government that Appellant actually intended to injure or harm the police officer.

In the case of (People v. Carmen), 36 Cal. 2d. 768, 228 P. 2d. 281 (1951), the Supreme Court of California held: "that the firing of a rifle to frighten a decedent and another without aiming at them and without intending to kill or injury anyone, though unlawful, would not amount to a felony and would fall short of the offense of assault with a dangerous weapon or even assault". The circumstances of the instant case would certainly seem to fall within the scope of the case of People v. Carmen. Here there was no firing of any weapon, no threats to kill or injure anyone and no testimony that Appellant intended to injure anyone. People v. Carmen

also held: "that an intent to injure was a necessary element of an assault with a deadly weapon". In the case of (People v. Montgomery) 114 P. 792, 793, 15 Cal. App. 305, the Court held: "the pointing of an unloaded gun at another, accompanied by a threat to shoot him, without any attempt to use it otherwise, does not constitute an assault with a deadly weapon". Also (People v. Bennett) 173 P. 1004, 1005; 37 Cal. App. 344, hend: "the pointing of an unloaded gun at the prosecuting witness, accompanied by a threat, without any attempt to use it otherwise, is not an assault with a deadly weapon", and cannot sustain a conviction for assault, for want of present ability to commit a violent injury on the person threatened in the manner attempted.

In (State v. Lemon) 263 S.W. 186, 188, it was held that, "a bare intent to commit an assault unless followed by some hostile demonstration will not constitute an assault". In (Johnson v. State) 200 S.W. 982; 132 Ark. 128, the Court stated: "the mere drawing of a pistol without actually presenting it in the attitude of firing, because prevented from presenting it, constitutes an assault when accompanied by threats, evidencing an intention to use it on the person threatened". In the instant case the testimony revealed that although Appellant had the pistol and it was taken away from him by the officer, he made no threats to anyone and under the rationale of (Johnson v. State) committed no assault. Appellant further cites the case of (Brabazon et ux v. Joannes Bros. Co., et al) 286 N.W. 21, 231 Wis. 426, in which the Court held: "an assault is an intentional attempt, by violence, to do an injury to another.....If there is no such intention, no present purpose to do such injury, then there is no assault. In the case of a mere assault the quo animo is material, as without an unlawful intention there is

no assault". Applying the circumstances of Appellant's case to the rullings of the many Courts in the foregoing cited cases, it is quite apparent that the Government failed to prove all the elements of the offense of assault on a member of the police force with a dangerous weapon.

CONCLUSION

For the reasons stated and developed in this brief, Appellant's conviction should be reversed.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,955

UNITED STATES OF AMERICA, APPELLEE,

v.

HERMAN E. BROWN, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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TABLE OF CASES

OTHER REFERENCES

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ISSUE PRESENTED*

In the opinion of appellee, the following issue is presented:

Whether there was sufficient evidence for the jury to find appellant guilty of carrying a dangerous weapon.

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*This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,955

UNITED STATES OF AMERICA, APPELLEE,

v.

HERMAN E. BROWN, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed April 2, 1969, appellant was charged with assault with a dangerous weapon (22 D.C. Code § 502), assault on a member of the police force with a dangerous weapon (22 D.C. Code § 505(b)), and carrying a dangerous weapon (22 D.C. Code § 3204). Trial was held on November 6, 1969, before the Honorable John H. Pratt, sitting with a jury, and appellant was found guilty of assault on a member of the police force with a dangerous weapon and carrying a dangerous weapon.[1] On January 19, 1970, appellant was sentenced to imprisonment for eighteen to fifty-four months on the charge of assaulting a police officer and one to three years for carrying a dangerous weapon, the sentences to run concurrently. This appeal followed.

On February 3, 1969, at approximately 5:30 p.m. Officers John Schmitt and Sterling Robinson of the Metropolitan Police received a dispatch to investigate a fight at 1014 Columbia

[1] The charge of assault with a dangerous weapon was dismissed (Tr. 19).

Road, N.W. (Tr. 21, 37). The dispatch alerted the officers that one of the participants in the altercation might have a gun (Tr. 37). When they arrived on the scene, they observed three people, appellant, his wife and his mother-in-law, standing in the street in front of the apartment building at the Columbia Road address (Tr. 22, 38). Although the two females were too hysterical to converse with the officers, appellant approached the squad car and announced that there was a man armed with a gun in his apartment (Tr. 22, 38). The officers and appellant scaled the stairs to the third floor apartment to apprehend the reported intruder. With appellant at their side, they searched every room of his apartment but found nothing.[2] As they approached the door to leave, Mrs. Brown met them and asked if they had retrieved the weapon. When Officer Schmitt informed her that they had failed to find anyone in the apartment, she replied, "My husband has the gun." (Tr. 24.) Appellant promptly departed, followed closely by the two officers. When he reached the living room, however, appellant turned and drew a gun from his right front pocket [3] and pointed it directly at Officer Schmitt (Tr. 24, 38–39). Schmitt quickly jumped towards appellant, subdued him and relieved him of the weapon. There were one live round and one expended shell in the gun, and appellant had three additional live rounds in his possession (Tr. 34, 41). Appellant was placed under arrest.

At trial both officers testified to the events of February 3, 1969, and related that on that date they were in full dress uniform, driving in a marked police squad car (Tr. 21, 37). Appellant was never out of their sight from the time they initially observed him standing on the street until the time the pistol was taken from his possession (Tr. 26, 42).

Appellant testified that on February 3, 1969, he did not speak to any police officer in front of his apartment building. Rather, he was alone in his apartment when the officers "entered by stealthy seizure" (Tr. 58) and surprised him as he

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[2] The search was completed within five to seven minutes (Tr. 22).

[3] We note an inconsistency in that Officer Schmitt testified at the preliminary hearing held on February 7, 1969, that appellant drew the gun from his left front pocket (P.H. Tr. 5).

was leaning over his divan (Tr. 59). Officer Schmitt attacked him and attempted to hit him in the face with the weapon identified as Government's Exhibit Number One. Appellant stated, "I had not seen this weapon prior to the time that Officer Schmitt attempted to strike me in my face, and guarded with only my free hand that I had . . . it's only obvious, it's very reasonable and common sense should be applied here that if I had attempted to do something to the officer and another officer standing with a gun drawn on me, I would have been deceased under the law." (Tr. 60.) The case then proceeded to verdict.

ARGUMENT

I. There was sufficient evidence for the jury to find appellant guilty of carrying a dangerous weapon

(Tr. 21–42)

Appellant asserts that his conviction for carrying a dangerous weapon must be reversed because "there was no testimony whatsoever that the weapon was ever seen, detected or seized other than in the living room of appellant's apartment . . . ." (Appellant's brief at 9). He reasons that, since possession of a weapon in one's home is excepted from the proscriptions of the statute,[4] the Government failed to establish that he carried a weapon illegally. In so doing, appellant displays his inability to apprehend the quantum of evidence necessary to support a jury finding of guilt. *Crawford* v. *United States,* 126 U.S. App. D.C. 156, 375 F.2d 332 (1967); *Curley* v. *United States,* 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied,* 331 U.S. 837 (1947).

Inferences reasonably drawn from the facts before the jury in the instant case point clearly to the obvious fact that appel-

[4] 22 D.C. Code § 3204 provides in pertinent part:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, *except in his dwelling house* or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereafter provided, or any deadly or dangerous weapon capable of being so concealed. [Emphasis added.]

lant had the pistol in his possession on the street and carried it from the street into his apartment. Both Officers Schmitt and Robinson testified that appellant *was constantly in their view* from the time that he initially approached them on the street to the time that he displayed the gun and pointed it at Officer Schmitt (Tr. 26, 42). Based upon this testimony, a reasonable person could certainly find that appellant had not obtained the weapon after entering the apartment but rather had carried the gun into the apartment from the outside. Such possession outside of his residence removes appellant from the shelter of any statutory exemption from prosecution.

Wilson v. *United States*, 91 U.S. App. D.C. 135, 198 F. 2d 299 (1952), should be dispositive. While standing by his automobile, Wilson was attacked by a group of men and women. He retreated to the driver's side of his car, obtained a pistol which was on the floor of the car, and fired at his attackers. He was acquitted by the jury of assault charges but found guilty of carrying a deadly weapon. In reviewing his conviction this Court held that his guilt "depended upon whether, in having a loaded pistol under the driver's seat of his automobile, he had the weapon on or about his person in violation of the statute." *Wilson* v. *United States, supra*, 91 U.S. App. D.C. at 136, 198 F. 2d at 300. Thus, although eyewitness testimony established only that Wilson held the weapon under the legally protected posture of one acting in self-defense so that that possession was not subject to criminal sanction, the jury could still find Wilson guilty of carrying the weapon illegally if it inferred that he possessed the gun prior to using it for his own protection.

As in *Wilson, supra,* the conviction in the instant case is based upon eyewitness testimony that appellant was seen carrying the gun under a "legally protected" posture. In addition, the evidence in the case at bar established that appellant was under constant observation from the time he met the officers when he would have been outside the purview of the exemption to the time of arrest. In accord with *Wilson,* the jury in the instant case need only have applied common sense to reach the in-

escapable conclusion that appellant possessed the gun before he entered his apartment and was therefore in violation of 22 D.C. Code § 3204.[5]

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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[5] Appellant's claim that the assault on a member of the police force charge cannot stand because "it was never established by any testimony offered by the Government that appellant actually intended to injure or harm the police officer" (Appellant's brief at 14) borders on the frivolous. Officer Schmitt testified that appellant "reached into his right front pocket and drew a sort of shiny small gun, wheeled and pointed it at me." (Tr. 24.) Certainly, a jury could reasonably believe that appellant intended to threaten the police officer and therefore committed an assault. *United States* v. *Daniels*, D.C. Cir. No. 22, 913, decided October 15, 1970, slip op. at 7; *United States* v. *Bridges*, — U.S. App. D.C. —, 432 F.2d 692 (1970). In any event, this is only a general-intent crime; a specific intent to cause injury is not an element of the offense. *Parker* v. *United States*, 123 U.S. App. D.C. 343, 359 F.2d 1009 (1966).

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